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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

CHAMBERLAIN WHOLESALE GROCERY COMPANY AND W. G. COZARD, WALTER NEUGEBAUER AND MARIE NEUGEBAUER, WILLIAM R. ELLIS AND ESTHER ELLIS, AND ANDREW REIS AND MILLIE REIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in the above cases on November 2, 1955.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (App., *infra,* pp. 1a–14a) is reported at 226 F. 2d 492.

JURISDICTION

The judgments of the Court of Appeals (App. *infra,* pp. 15a–16a) were entered on November 2,

1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

When a party to a federal condemnation proceeding demands a jury trial, does Rule 71A (h) of the Federal Rules of Civil Procedure empower the District Court, in the absence of exceptional or extraordinary circumstances, to elect to submit the issue of compensation to three appraisal commissioners?

RULE INVOLVED

Rule 71A (h) of the Federal Rules of Civil Procedure provides:

> TRIAL.—If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a

commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

The Fort Randall Dam and Reservoir Project on the Missouri River in South Dakota is one of the many flood control projects authorized by the Act of December 22, 1944, 58 Stat. 887. Proceedings to condemn the lands needed for the project were instituted from time to time, the four cases directly concerned here being commenced in 1952 and 1953.

These four cases present similar proceedings and rulings. Six additional cases with practically identical facts are pending in the Court of Appeals awaiting the outcome of the instant cases. The property taken from respondent Chamberlain Wholesale Grocery Company represented buildings erected under a 25-year lease from a railroad company. The other three cases represented generally the river bottom portion of stock-raising ranches: 394 acres out of the 2,090-

acre Neugebauer ranch, 689 acres of the 4,000-acre Ellis ranch, and 1,210 acres of the 5,815-acre Reis ranch. The properties were all located in or about Chamberlain, South Dakota, which is 90 miles from Pierre and 145 miles from Sioux Falls.

In each instance, the Government's complaint contained a demand for a jury trial. This was opposed by the landowners who sought a reference to commissioners under Rule 71A (h) of the Federal Rules of Civil Procedure (*supra*, pp. 2–3). Supporting affidavits were filed by both sides, after which the court ordered a reference to appraisal commissioners, the same persons being appointed in each case. Exceptions of the United States to the report of the commissioners in each case were overruled and the appeals followed. The Government contended that Rule 71A (h) provided for jury trial as a general rule and accorded any party a right to such trial upon demand. Refusal of such demand was authorized, it was contended, only in exceptional or unusual cases. Rejecting this contention, the Court of Appeals adopted respondents' position that the rule vested in the district court a broad discretion to make election between the two methods of trial (App., *infra*, pp. 12a–14a).

REASONS FOR GRANTING THE WRIT

1. Rather than purporting to vest in the District Court a full option as to the method of trial,

Rule 71A (h) provides that a party "may have a trial by jury * * * unless the court in its discretion orders that" for stated reasons the issue as to compensation shall be determined by a commission. In *United States* v. *Theimer,* 199 F. 2d 501 (C. A. 10), the court referred to trial by commission as being available only in "exceptional and extraordinary circumstances" (199 F. 2d at 503; see also 199 F. 2d at 504), and concluded "that the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A (h) as a matter of right and that where demand is made for the same the judge must grant a jury trial, unless under the facts as they appear in the case because of the character, location, or quantity of the property to be condemned, or for other reasons revealed by the facts of the case, the interest of justice warrants the submission of question of value and compensation to a commission" (199 F. 2d at 503–4). This view was reiterated in *United States* v. *Waymire,* 202 F. 2d 550, 552 (C. A. 10): "Under such provision in the rule, any party to a condemnation proceeding is ordinarily entitled as a matter of right to trial by jury of the issue of just compensation * * *." The same interpretation of the rule "as prescribing jury trial as the usual and customary procedure to be followed in fixing the value of property taken in condemnation proceedings, and as authorizing reference to Commissioners only in cases wherein the judge, in the exercise of sound

discretion based upon reasons appearing in the case, finds that the interests of justice so require" was adopted by the Judicial Conference. H. Doc. No. 490, 82d Cong., 2d sess., pp. 5–6.

The conflict between these authorities and the present decision cannot be reconciled by reference to the "broad discretion" of the trial court (App., *infra*, pp. 12a, 14a). The Tenth Circuit interpretation clearly is that the discretion can be applied only to the exceptional or extraordinary cases. There is no basis for the exercise of discretion in the ordinary case. Under the contrary view of the Eighth Circuit, expressed in the opinion below, the District Court has a broad discretion at all times "to choose between the use of juries or of commissioners in the condemnation cases brought before them" (App., *infra*, p. 14a), *i. e.*, even in the normal or usual case. The difference between the views of the circuits is not a mere difference in the individual exercise of discretion in particular cases, but a basic divergence as to when the condemnation court may properly consider whether or not to exercise its discretion. That fundamental conflict is illuminated by the facts and circumstances of the present cases.

2. Neither the trial court nor the Court of Appeals asserted that either these four or the other six cases pending on appeal were unusual or extraordinary condemnation cases, and the ordinary character of these flood control proceedings is plain. The location of the lands in and about

Chamberlain, South Dakota, some 100 miles, more or less, from the city where the federal court sits, presents a very common situation in federal eminent domain. Flood control, river improvement and irrigation projects necessarily require lands adjacent to rivers some distance from populous centers. In addition, the desirability of disrupting the populace and the local economy as little as possible, as well as the consideration of cost of acquisition, leads to the location of large federal projects of all kinds, such as atomic areas or military testing or training areas or airfields, at comparable distances from legal centers. There is no peculiar problem of transportation involved in these cases, nor are the lands unusually inaccessible for farmlands. Indeed, the property of the Chamberlain Wholesale Grocery Company abuts upon the line of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company in the city of Chamberlain, South Dakota (R. 7).

The character of the particular lands likewise emphasizes the routine nature of the cases. Like any well-balanced farm in the west, these properties contained bottom lands, crop lands, meadow lands, bench lands, pasture lands and woodlands, together with the usual improvements. It is in recognition of the integrated nature of such farms that the general rule is established that they are valued as a unit and not by addition of values assigned to the various component parts. In quantity, the farms taken are also quite average

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for the area. And even if regard is had to the entire area of the project rather than the individual properties, it is similar to many other federal undertakings for various purposes. Rare indeed would be the federal condemnation case where some, if not all, of the factors here present could not be advanced to justify denial of the right to a jury trial. In short, these cases are entirely typical, not unusual. The ruling below can, therefore, be supported only by concluding that the trial court is always vested, in the ordinary as well as the exceptional case, with a choice as to the method of trial of condemnation cases.

3. It is important that the conflict of view as to Rule 71A (h), and its proper application, be resolved by this Court. There are now pending proceedings instituted by the federal government to condemn land for various public purposes located in almost every federal district. All indications are that equally widespread programs requiring land acquisition will continue in the reasonably foreseeable future. Under the rationale of the present decision, which does not rest upon any unusual features of these cases, denial of jury demands made by either the Government or the landowner would be warranted in any of the numerous pending cases. For example, submission to commissioners, as in the instant situations, of all of the tracts within a particular project or even of all condemnation cases in a federal judicial district appears to be

permissible under the Eighth Circuit position in the holding below. There are increasing indications of resort by district judges to the commission system in run-of-the-mill cases, and because of the many important differences in the presentation of cases to a jury and to commissioners, in the manner of making and reviewing rulings on questions of law and of fact, and in the preservation of questions for appellate review (if that is available), the effectiveness of a demand for a jury trial substantially influences the parties' conduct of their cases. The question whether the *right* to a jury trial, which is accorded by statute at some stage of the proceeding in about 44 of the 48 states, is no longer available in the ordinary federal condemnation proceeding should, we submit, be determined by this Court. For some time, that issue has been the most important one facing the federal government in the field of eminent domain.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

JANUARY 1956.

United States Court of Appeals for the Eighth Circuit

No. 15302

UNITED STATES OF AMERICA, APPELLANT

vs.

CHAMBERLAIN WHOLESALE GROCERY COMPANY AND W. G. COZARD, APPELLEES

Appeal from the United States District Court for the District of South Dakota

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No 15303

UNITED STATES OF AMERICA, APPELLANT

vs.

WALTER NEUGEBAUER AND MARIE NEUGEBAUER, APPELLEES

Appeal from the United States District Court for the District of South Dakota

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No. 15304

UNITED STATES OF AMERICA, APPELLANT

vs.

WILLIAM R. ELLIS AND ESTHER M. ELLIS, APPELLEES

Appeal from the United States District Court for the District of South Dakota

No. 15305

UNITED STATES OF AMERICA, APPELLANT

vs.

ANDREW W. REIS AND MILLIE REIS, APPELLEES

Appeal from the United States District Court for the District of South Dakota

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[November 2, 1955.]

Roger P. Marquis, Attorney, Department of Justice [Perry W. Morton, Assistant Attorney General, Clinton G. Richards, United States Attorney, and John F. Cotter, Attorney, Department of Justice, were with him on the brief], for appellant.

John F. Lindley [M. A. Brown was with him on the brief], for appellee, Chamberlain Wholesale Grocery Company.

Donald J. Porter, for appellees, *Andrew Reis* and *Millie Reis.*

M. T. Woods [G. F. Johnson was with him on the brief], for appellees, *Walter Neugebauer* and *Marie Neugebauer,* and *William R. Ellis* and *Esther M. Ellis.*

Before WOODROUGH, JOHNSEN and VOGEL, Circuit Judges

WOODROUGH, *Circuit Judge:* These four appeals are from judgments entered upon awards made by commissioners appointed by the District Court to determine compensation pursuant to Rule 71A (h) of the Federal Rules of Civil Procedure, 28 U. S. C. A. 1954 pocket part.

The lands were among those taken for the Fort Randall Dam and Reservoir in South Dakota. In No. 15302 the land taken (1.19 acres) is situated in the City of Chamberlain which is in the Southern Division of the District of South Dakota, for which court is held at Sioux Falls, about 195 miles distant. The land was part of the right of way of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, improved by buildings owned by and used by the Chamberlain Wholesale Grocery Company under a 25-year lease from the railroad company. Since the latter disclaimed any interest, the trial involved only the value of the lessee's improvements. In No. 15303, 394.26 acres were taken from a stock-raising ranch of 2,090.98 acres owned by appellees, Mr. and Mrs. Walter Neugebauer. In No. 15304, 689.43 acres were taken from a stock-raising ranch of 4,001.44 acres owned by appellees, Mr. and Mrs. William R. Ellis. In No. 15305, 1,210.72 acres were taken from another stock-raising ranch of 5,815.95 acres owned by appellees, Mr. and Mrs. Andrew W. Reis.

In each case, the petition in condemnation contained a demand for trial by jury. Each appellee applied to the court for determination of the issue of compensation by commissioners. In each instance, the application was supported by affidavit of appellees or their attorney, and opposed by affidavit of the Special Assistant to the United States Attorney. The most detailed affidavit supporting an application for commissioners was that of Mr. and Mrs. Reis in No. 15305. So far as material, it stated:

The 1,210.72 acres to be condemned by the plaintiff in this proceeding are an integral part

of a 5,815.95 acre ranch owned by affiants, and situated some 20 miles southwest of Chamberlain, South Dakota, and at a junction of the Missouri river and the White river, in Lyman County, South Dakota. The nearest Federal Court town is Pierre, South Dakota, which is approximately 125 miles distant from the ranch. Affiants intend to produce from five to ten neighbors and Chamberlain residents at the hearing on this matter, to give testimony concerning the value of said land being condemned and it will be expensive and inconvenient for such witnesses to be compelled to travel to Pierre, South Dakota in order to give their testimony in this matter. That part of the road to this ranch from the City of Pierre is impassable, or nearly so, in wet or snowy weather; that for a jury to travel from the City of Pierre to view the land at the times of the year it would sit on this case would be very expensive and might easily be impossible because of weather conditions and road conditions, this being particularly true as to any traveling about upon and within the ranch itself.

That since part of this land adjoins the Missouri River and the White River, and since said land is located in a fly-way of Canada geese that rest on sand-bars in said Missouri and White rivers in and during the migratory flight of such geese from Canada and North Dakota to the southern states, part of the tract involved herein is peculiarly valuable as geese and duck hunting grounds. Said fly-way involved in this tract is one of the best Canada geese hunting grounds in the central part of the United States, and the value of the hunting rights upon said land is real

and substantial; part of said tract has been released by affiants from the plaintiff, but they are prevented by such lease terms from leasing said hunting rights to others, and are prevented from themselves hunting upon said lands unless they will agree in turn to permit the public to hunt thereon without any permission from affiants as lessees and former owners.

The 1,210.72 acres being condemned by the plaintiff are made up as follows: about 140 acres of river bottom crop land, about 60 acres of tillable bottom meadow land, about 23 acres of upland crop land, about 400 acres of creek and timber pasture land, about 100 acres of valley pasture, about 60 acres of accretion land, about 90 acres of willow bar, and about 300 acres of upland pasture. Some of the bottom land produces alfalfa, and some is devoted to the production of alfalfa seed, and some is used for the growing of small grain, corn and cane crops. Due to its location and other natural conditions, the said timber land furnishes excellent shelter and protection for livestock in the winter. In addition, there are two flowing wells on the property being taken, such wells providing year round water in ample quantity for the livestock herd on the ranch. The property being taken is well improved, containing a two story residence, barn, machine shed, henhouse, granaries, garage, corrals, brooder house, cribs, and concrete stock tank, and other miscellaneous improvements. Affiants are being left with about 4,600 acres of the original 5,800 acre ranch. The acres remaining are in part upland pasture and in part crop land. Before the condemnation, the ranch was a balanced ranch, being

properly equipped for the raising of livestock and caring for the same on the ranch the year around, and raising on the ranch all feed necessary for such stock the year around. The 1,210.72 acres being taken by the plaintiff are property which provided much of the winter feed and all the winter shelter for the stock, thus the ranch is no longer a balanced ranch, and it is questionable that successful operations could be conducted at all on the remaining acreage because of the loss of winter quarters, as aforesaid.

To fix a just compensation in the proceeding for the 1,210.72 acres taken by the plaintiff, multiple circumstances are presented, which call for the consideration of various elements. These elements include the value of the land taken in fee, severance value, flowage easement value, value of improvements, value of hunting rights, and numerous other factors. This ranch is located within a few miles of several other similar ranches, as to which ranches the Court has recently granted similar motions for reference to Commissioners. Affiants respectfully submit that it is both important and fair and just to both plaintiff and defendants herein that all of the ranches in this immediate area which are being taken at this time for the Fort Randall re-location be compensated for on a uniform basis. Reference of this case, as well as the several others recently already referred, will tend to prevent discrimination and will provide for uniformity of compensation. It is for just such reasons that in its 1951 supplementary report, the Advisory Committee Notes on Rule 71A (h) recommend the use of a reference to Commissioners, not only

in TVA projects, but also in other large governmental projects such as flood control, hydroelectric power, reclamation, and others.

The opposing affidavit of the Special Assistant to the United States Attorney stated:

That said tract which is being acquired by the Government consists of 1,210.72 acres of land used principally for agricultural purposes, and that said tract is a part of a larger acreage totalling 5,815.95 acres. Said tract is located about fourteen miles southwest of Chamberlain, South Dakota, at the west side of the mouth of the White River. Chamberlain, South Dakota, is approximately ninety miles from Pierre, South Dakota, and approximately one hundred forty-five miles from Sioux Falls, South Dakota, both of which are Federal Court towns, and there is a good hard surface oiled and paved road and mainly traveled highway to both Sioux Falls, South Dakota, and Pierre, South Dakota. That the next regular jury term in Pierre, South Dakota, will commence on May 11, 1954.

That the tract of land in question is not of unusual character and that its greatest use is for agricultural purposes, principally for grazing of cattle. That there are no factors or unusual circumstances stated in defendants' Motion or Affidavit in support of same to justify the appointment of a commission of three persons to determine the issue of just compensation, but that the same can properly and more feasibly be submitted to the next regular jury term of Federal Court.

That the appointment of commissioners involves considerable additional expense to the

United States of America by reason of the fact that certain per diem fees must be paid to said commissioners. That said action as far as this tract is concerned is a simple condemnation proceeding in which the plaintiff, United States of America, seeks to condemn 1,210.72 acres of land used for agricultural purposes and lying within less that one hundred fifty miles of a Federal Court town, and that there are no extraordinary factors or circumstances warranting the appointment of commissioners in this case.

The Court's order appointing commissioners recited:

The Court then heard the affidavits of the parties and also heard the argument of counsel for each of the parties hereto, and it appearing to the satisfaction of this Court from the evidence adduced that the lands of the defendants are situated approximately 125 miles from the nearest Federal Court House located at Pierre, South Dakota; that the issues in this action involve lands varied in kind, character and adaptability, including crop, bottom, meadow, bench, pasture and grazing land, land adaptable to the production of alfalfa, hay and alfalfa seed, corn, grain, and other crops, natural livestock shelter, flowing wells and springs for stock water and that there is involved in this case the severance of land from the remainder of the ranch and the issue of severance damage; that the ranch in this case constituted a balanced unit before the taking; that said ranch provided good annual wild fowl hunting; that this case involves the taking of various ranch buildings and improvements; that upon the hearing of the issue of just com-

pensation in this case the defendants intend to offer the oral testimony of from five to ten of their neighbors and residents of their area and that it would be expensive and inconvenient for such witnesses, to travel to the nearest Federal Court House in Pierre, South Dakota to give their testimony in this case.

And it further appearing to the satisfaction of this Court from the evidence adduced that it is necessary that the triers of the issue of just compensation should carefully examine each and every one of the various kinds and parcels of land involved herein as well as hear the testimony upon said issues and that it would be, for all practical purposes, impossible to cause or permit a jury to make such an examination.

And, it appearing and the Court now finding and deciding that due to the character, location and quantity of the property taken and for other reasons above recited, it is necessary and in the interest of justice that the issue of just compensation in this matter be tried to Commissioners pursuant to said Rule 71A, * * *.

After viewing all the lands, the commissioners (the same in all four cases) proceeded to trial at Chamberlain, South Dakota. The first case heard (now No. 15303) began on November 18, 1953 and ended on November 20. The owner and seven others testified for him; the Government called six witnesses. No. 15302 took but one day, November 23. Eight witnesses, including the owners' president, testified for it; the Government called three. In No. 15305 after an afternoon session on November 24 at the home of Mr. Reis to take his testimony, hearings were resumed at

Chamberlain December 14, and concluded the next day. Besides Mr. Reis and his two sons, six witnesses were called for the defendant and eight for the government. Trial of No. 15304 took three days, December 16 through December 18. The owners' eight witnesses included the man and wife who owned the land; the Government called five witnesses.

In the case to determine compensation due for the land taken from the ranch of Mr. and Mrs. Reis (now No. 15305) whose affidavit has just been set out, the 1,200-odd acres taken included all the ranch improvements; dwelling, barn, etc. Five of the owners' witnesses testified in respect of the amount of compensation. Henry A. Boe and W. L. Dyce appraised, first, land, and, second, improvements taken and finally, value of the remaining land. Mr. Boe valued the land at $73,260 made up as follows: 206 acres at $110 an acre, 400 acres at $90, 100 acres at $30 and 464 acres at $25. He valued the improvements, which he itemized, at $26,245, and he estimated severance damages to be $42,050, or $10 an acre. Mr. Dyce valued the land at $84,000; 600 acres at $100 an acre, 160 at $60, 315 at $40 and 90 at $20. His valuation of the itemized improvements was $25,575 and his estimate of severance damages was the same as Mr. Boe's. P. V. Lenz, the only other witness who testified as to total compensation, said without detail that the land taken with improvements was worth about $125,000 and that the remaining land was damaged at the rate of $10 an acre. Mr. Reis testified that severance damages amounted to $10 an acre. Lee Schoen-

hard testified as to the reproduction cost new less depreciation of the dwelling.

On February 12, 1954, the commissioners submitted in each case a report which without discussion made a finding as to compensation due. The recommended awards were as follows:

No. 15302	$56,524
No. 15303	43,581
No. 15304	39,836
No. 15305	80,320

Exceptions filed by the Government to the recommended awards as excessive and based on inadmissible testimony were overruled by the trial court which thereupon entered judgments for the amounts recommended by the commissioners.

The only ground upon which the government (appellant) predicates error and asks for reversal of the judgments is that the court erred in each of the cases in denying the demand for a jury trial under Rule 71A (h) duly and timely made in each of the cases by the Government.

The legislation under which the condemnation proceedings for the Fort Randall Dam were had made no provision for any special tribunal for the trial of the issue of just compensation so that the following provisions of Rule 71A (h) were applicable and governed the procedure in the cases: "* * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other rea-

sons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. * * *."

It is contended for the government that the true intent and purport of the quoted provisions of the Rule is that it "gives either party to a condemnation proceeding a right to demand a jury trial of the issue of compensation" and "that ordinarily that demand must be granted" and can be denied only when, by virtue of circumstances peculiar to a particular case, the issue of just compensation can be determined more justly by commissioners than by a judge and jury." The necessary implication from the contention seems to be that this court should reverse the judgments in these cases unless the appellees can show from the record to the satisfaction of the appellate court that judge and jury could not have determined compensation as justly as commissioners.

The position of the appellees, on the other hand, is that Rule 71A (h) vests a broad discretion in the District Court to make election between the two traditionally approved methods of procedure and has empowered only that court in its discretion to prescribe which procedure is to be followed to try the issue of compensation in the condemnation cases as to which Congress has not chosen to set up any "tribunal specially constituted" to perform the task. They point out that the form of the Rule as it now stands promulgated in the first instance by the Supreme Court and thereafter adopted by the Congress reflects a compromise between the advocates of commissioners and those favoring the court and jury as the appropriate tribunal. They refer to the origins and

history of the Rule published in connection with it in 28 U. S. C. A. Pocket Part, particularly the Supplementary Report of the Advisory Committee to the Supreme Court of March, 1951. It is stated in that report, i. *a.*, that the reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were the same reasons that had been urged as to other large governmental projects, such as flood control and others, and the report added, "If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound." The Committee observed that "it would be difficult to state in a rule the various conditions to control the District Court in its choice" but the Committee listed the reasons that had convinced it of the desirability of the use of commissioners in TVA cases[1] and stated "In large projects, like the TVA, the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas where use

[1] 1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result. 2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home. 3. It is impracticable to take juries long distances to view the premises. 4. If the cases are tried by juries the burden on the time of the court is excessive.

of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The committee are convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases."

There can be no doubt that when the committee "earnestly" recommended "the Rule as now drafted for promulgation by the Court, in the public interest", it intended a broad discretion to be vested in the District Court to choose between the use of juries or of commissioners in the condemnation cases brought before them. We think the rule as it stands does vest such discretion in the District Court and in the present cases we find no abuse of discretion by the District Judge in denying the government's demand for jury trial and directing the use of commissioners to fix compensation. The showing made by each of the landowners and the findings thereon of the court afforded sufficient basis for the Court's orders. We are in accord with the decisions of the Court of Appeals of the Tenth Circuit in *United States* v. *Waymire,* 202 F. 2d 550, and *United States* v. *Wallace,* 201 F. 2d 65. We do not find the conclusion arrived at in *United States* v. *Theimer,* 199 F. 2d 501, controlling here.

AFFIRMED.

United States Court of Appeals for the Eighth Circuit

No. 15302—September Term, 1955. Wednesday, November 2, 1955

UNITED STATES OF AMERICA, APPELLANT,

vs.

CHAMBERLAIN WHOLESALE GROCERY COMPANY AND W. G. COZARD

Appeal from the United States District Court for the District of South Dakota

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause, No. 873, Civil, S. D., Tracts Nos. J-401 and J-403, be, and the same is hereby, affirmed.

November 2, 1955.

United States Court of Appeals for the Eighth Circuit

No. 15303—September Term, 1955. Wednesday, November 2, 1955

UNITED STATES OF AMERICA, APPELLANT,

vs.

WALTER NEUGEBAUER AND MARIE NEUGEBAUER

Appeal from the United States District Court for the District of South Dakota

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause, No. 159 Civil, C. D., Tracts Nos. I-28, I-32, I-33 and I-35, be, and the same is hereby, affirmed.

November 2, 1955.

United States Court of Appeals for the Eighth Circuit

No. 15304—September Term, 1955. Wednesday, November 2, 1955

UNITED STATES OF AMERICA, APPELLANT,

vs.

WILLIAM R. ELLIS AND ESTHER M. ELLIS

Appeal from the United States District Court for the District of South Dakota

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause, No. 163 Civil, C. D., Tract H-51, be, and the same is hereby, affirmed.

November 2, 1955.

United States Court of Appeals for the Eighth Circuit

No. 15305—September Term, 1955. Wednesday, November 2, 1955

UNITED STATES OF AMERICA, APPELLANT,

vs.

ANDREW W. REIS AND MILLIE REIS

Appeal from the United States District Court for the District of South Dakota

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause, No. 163 Civil, C. D., Tract No. I-47, be, and the same is hereby affirmed.

November 2, 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

UNITED STATES OF AMERICA,
Petitioner,

v.

ANDREW W. REIS and MILLIE REIS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 226 F. 2d 492. The District Court wrote no opinion.

JURISDICTION.

The judgment of the Court of Appeals was entered November 2, 1955 (Pet. 16 a). The petition for a writ of certiorari was filed January 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Where the trial court, acting pursuant to Rule 71 A (h) of the Federal Rules of Civil Procedure, referred this federal condemnation proceeding to commissioners rather than a jury, was such reference, under the particular facts here, within the sound discretion vested in the court by the rule?

RULE INVOLVED.

Rule 71 A (h) of the Federal Rules of Civil Procedure.

ARGUMENT.

1. There is no question in this case as to whether Rule 71 A (h) of the Federal Rules of Civil Procedure vests a discretion in the trial court to appoint commissioners to try the issue of compensation in a federal condemnation proceeding. The rule specifically so states: "* * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. * * *" Moreover, the Government brief recognizes that a "sound discretion" is lodged in the trial court under the rule. The brief (Pet. 5, 6) quotes approvingly a Judicial Conference report interpreting the rule as "* * * authorizing reference to Commissioners only in cases wherein the judge, in the exercise of sound discretion based upon reasons appearing in the case, finds that the interests of justice so require." H. Doc. No. 490, 82d Cong., 2d sess., pp. 5-6.

Since both sides here interpret the rule as vesting discretion in the trial court, the instant case then simply involves the question of whether an abuse of discretion by the trial court has been shown. The answer, of course, will turn almost wholly upon the particular facts of the case.

2. The Government cites *United States v. Waymire*, 202 F. 2d 550 (C. A. 10), as authority for its argument that reference to a commission may be ordered only in the "exceptional" or "extraordinary" case. Presumably, petitioner regards the fact situation there as sufficiently unusual because in that case a reference to a commission was affirmed by the Tenth Circuit. But if the *Waymire*

case was "exceptional" then so is the instant case, because the material facts in the two cases, by reason of which the reference was ordered, are strikingly similar. Thus, the question of the result in what the Government might call an "ordinary" case is a point never reached in the instant case.

Indeed, the facts here are even more favorable than were those in *United States v. Wallace,* 201 F. 2d 65, where the Tenth Circuit again affirmed appointment of commissioners by a district court. In that case, after noting that the land was 60 miles from the nearest federal court town (compared with 125 miles in the instant case), and that 6 witnesses living near the land would be required to travel such distance (there were 11 such witnesses here) the court found the tract of "* * * unusual character in that it was valuable for hunting and fishing." The same grounds are present here, since, as the respondent Reis' affidavit recited (R. 94): "* * * Said flyway involved in this tract is one of the best Canada geese hunting grounds in the central part of the United States * * *."

The Government brief (Pet. 7) states: "There is no peculiar problem of transportation involved in these cases, nor are the lands unusually inaccessible for farmlands." However, as respondents' affidavit recited (R. 93), part of the road to the Reis ranch is frequently rendered impassable by rain or snow at the time of the year when federal jury terms are held in the district, and travel within the 5800 acre ranch itself is especially difficult at such times. The order appointing commissioners here specifically recited the trial court's finding that, under the circumstances shown, it would be practically impossible to have a jury view the premises (R. 99). Thus, the problem of the long distances here was, in fact, further aggravated by the inaccessibility of the Reis ranch, and trial by jury would probably have denied both sides the opportunity of a view by the triers of the fact.

It is therefore not correct to say, as petitioner does, that the court below necessarily regarded this case as an "ordinary" or "usual" one. The order of the trial court here (R. 98, 99, 100), set out in detail its many factual findings as to the character, location, and quantity of the land involved and as to the other reasons which, in the interest of justice, impelled the court, in its sound discretion, to refer the case to commissioners. And, significantly, the material parts of the trial court's order, and of respondent Reis' affidavit were quoted at length in the opinion of the court below, making it clear that the Court of Appeals considered the particular facts of the case important.

The detailed factual recital in the affidavit and order is alone sufficient to distinguish the instant case from *United States v. Theimer,* 199 F. 2d 501 (C. A. 10). There the order appointing commissioners was reversed because the trial court's order was silent as to the specific facts or grounds therefore, except to simply give the court's conclusion that the interest of justice required the order.

There is, therefore, no conflict with the three Tenth Circuit cases. The *Waymire* and *Wallace* cases *(supra),* are in accord with the decision here, and the *Theimer* case *(supra),* is readily distinguishable on its facts.

3. Whether the Government has a *right* to a jury trial in the "ordinary" (Pet. 9) federal condemnation proceeding is a question not presented here, since each case must largely turn on its own particular facts. But whether the Government has a *right* to a jury trial under the specific facts here, was, we submit, settled by this Court in 1951 when the Court adopted Rule 71 A (h). The form of rule favored by the Department of Justice was proposed by the Advisory Committee in a May, 1948, report to this Court. Such proposed rule preserved the existing systems in the District of Columbia and in TVA cases, but provided for a jury to fix compensation in all other cases. (See Supplementary Report of the Advisory Committee, U. S. Code,

Congressional and Administrative Service, Vol. 2, pp. 2615 to 2622, at pp. 2615, 2616, 2617, 82nd Cong., 1st sess., 1951.) But after considering this draft, the Court returned it to the committee "for further consideration" (Supplementary Report of the Advisory Committee at p. 2615, *supra).* In March, 1951, after several years further study the present form of the rule was earnestly recommended to this Court by the committee, even though, as the committee report notes (Supplementary Report of the Advisory Committee at p. 2622, *supra*): "We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal." This Court thereupon promulgated the rule notwithstanding the Department of Justice opposition. Since then the Department has been unsuccessful in its attempts to persuade Congress to change the rule by statute.

We do not doubt the Government considers the general problem of commissions or juries an important one. But, regardless of this case, it is likely to remain a problem, in the Department's view, until it can persuade this Court or Congress to change the plain words of the rule itself.

CONCLUSION.

The judgment of the court below, under the particular facts presented, is correct and just and should be affirmed.

Respondents therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DONALD J. PORTER,
Chamberlain, South Dakota,
Attorneys for Respondents
Andrew W. Reis and
Millie Reis.

February, 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.—

UNITED STATES OF AMERICA, PETITIONER

v.

CHAMBERLAIN WHOLESALE GROCERY COMPANY AND W. G. COZARD, WALTER NEUGEBAUER AND MARIE NEUGEBAUER, WILLIAM R. ELLIS AND ESTHER ELLIS, AND ANDREW REIS AND MILLIE REIS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, Walter and Marie Neugebauer, and William R. and Esther Ellis, hereby make and file this brief in opposition to the petition of the Solicitor General for a writ of certiorari in the above causes and so doing respectfully contend that the alleged grounds for certiorari do not in truth exist.

The petition purports to be premised on a conflict between the decisions of the Courts of Appeal of the 8th and 10th Circuits. The 8th Circuit Court of Appeals found no such conflict and so stated in the decision in the case at bar where the court said:

> "We are in accord with the decisions of the Court of Appeals of the Tenth Circuit in United States v. Waymire, 202 F. 2d 550, and United States v. Wallace, 201 F. 2d 65. We do not find the conclusion arrived at in United States v. Theimer, 199 F. 2d 501, controlling here. Affirmed." 226 F. (2) 492, 498.

Turning to the 10th Circuit cases we find the following:

In *U. S. v. Theimer* (C. A. 10), 199 F. (2) 501. The reason for appointing commissioners was "to remove all obstacles that caused delay and bring this action to a conclusion." The trial court made no statement or finding as to what prompted its action. So far as the opinion shows, no extraordinary circumstances were present.

In *U. S. v. Wallace* (C. A. 10), 201 F. (2) 65, Judge Murrah, who was one of the judges in *U. S. v. Theimer*, joined with Judge Phillips in the majority opinion, and they found a difference between that case and *U. S. v. Theimer*. The court says:

> "We think the instant case is distinguishable on the facts from United States v. Theimer, 10 Cir., 199 F. 2d 501. Here, the land was situated a long distance from a Federal court town. It would have been expensive to have taken a jury from the court town to view the land. It would have been inconvenient for the local witnesses who resided in the vicinity of the land to travel to a Federal court town to give their evidence. The land was of a peculiar nature in that it had a value for hunting and fishing. Only one 80-acre tract of land was involved. In view of those facts, we are of the opinion that the trial court, in the exercise of a sound discretion, was justified in ordering that the issue of just compensation be determined by a commission appointed by it."

The court could not more clearly hold that there is discretion in the District Court to order Commissioner trials.

In *U. S. v. Waymire* (C. A. 10), 202 F. (2) 550:

> ". . . In view of all these facts and circumstances considered in their totality, it cannot be said that the court erred in appointing a commission to fix just compensation for the various properties and rights in properties to be condemned."

The petitioner contends that this court's rule 71 A (h) requires a District Court to grant a jury trial in the absence of exceptional or extraordinary circumstance. Petitioner in effect takes the position that there can be no facts warranting the exercise of this discretion. On the other hand, the Court of Appeals of the 10th Circuit and now that of the 8th Circuit have recognized as sufficient to warrant trial to commissioners, a considerable number of factors which are described in the opinions above cited.

The matter is given careful consideration in the decision of the 8th Circuit in the case at Bar. The Court there recognizes the problem for what it is—simply a question of whether the evidence submitted warranted the exercise of the discretion of the trial court in favor of the appointment of commissioners. The Court concluded that it did, and summarized its holding in the final paragraph of its opinion, 226 F. (2) page 498, which reflects the unanimous opinion of the three judges who sat on the case.

The Court's opinion also shows what is made more manifest by this petition for certiorari, to-wit: That the Department of Justice has opposed Rule 71 A (h) since prior to its adoption. Apparently this is a further effort to nullify or limit its effect. Petitioner cites, bottom of Page 5 and top of Page 6 of his Brief, a report of a Judicial Conference (H. doc. No. 490 82nd Congress, 2nd session,

pages 5-6) which appears to be an effort on the part of a committee to work out a compromise, yet prevent the passage of Senate Bill 1958 (which would have required jury trials in these cases) in that Session. It is not to be compared or placed in the same class as authority with the decisions of the Courts of Appeal of the 8th and 10th Circuits.

WHEREFORE Petitioners pray that the petition for certiorari be denied.

Respectfully submitted,

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

UNITED STATES OF AMERICA, Petitioner,

v.

CHAMBERLAIN WHOLESALE GROCERY COMPANY and W. G. COZARD, WALTER NEUGEBAUER and MARIE NEUGEBAUER, WILLIAM R. ELLIS and ESTHER ELLIS, and ANDREW REIS and MILLIE REIS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS

Chamberlain Wholesale Grocery Company and W. G. Cozard in Opposition.

OPINION BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals is reported at 226 F. 2d 492.

JURISDICTION.

The judgment of the Court of Appeals was entered November 2, 1955 (Pet. 16a). The petition for a writ of certiorari was filed January 30, 1956. The jurisdiction of this Court is invoked by appellants under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Where the trial court, acting pursuant to Rule 71 A (h) of the Federal Rules of Civil Procedure and under the facts in these particular cases referred these Federal condemnation proceedings to Commissioners, were such references under the facts existent in these cases within the discretion of the District Court under Rule 71 A (h)?

RULE INVOLVED.

Rule 71 A (h) of the Federal Rules of Civil Procedure.

STATEMENT.

These cases are condemnation actions for the acquisition of land required by the United States on account of the construction of the Fort Randall Dam in the Missouri River at a point approximately six miles south of Lake Andes, South Dakota. The Fort Randall Dam is one of the projects authorized by the Act of Congress of December 22, 1944, and involves the taking of approximately 125 to 150 miles of the Missouri River bottom land in the State of South Dakota. Many tracts required on account of the Fort Randall Dam have been acquired in condemnation and as to many of them agreement was not reached with the landowners and trial on the issue of compensation became necessary.

In each of these cases following affidavits being filed by both sides, the District Court ordered a reference to a Commission and following Commission hearings the District Court consisting of a different Judge entered judgments based on the Commission findings.

ARGUMENT.

Appellants indicate that the Tenth Circuit interpretation of Rule 71 A (h) is materially different and contrary to the view of the Eighth Circuit expressed in the opinion below. Two cases from the Tenth Circuit are cited by appellants, namely United States v. Theimer, 199 F. 2d 501 and United States v. Waymire, 202 F. 2d 550. As a matter of fact this question has been presented three times in the Tenth Circuit, the first time being in October, 1952, in the case of United States v. Theimer, which involved the condemnation of a 171-acre tract for airport use and an easement over two other tracts of 12 acres and 1 acre respectively lying adjacent to the airport. The Court held in that case that none of the factors specifically set out in the rule warranting the Judge in taking the case from a jury, were there present. As the Court stated "The motion for the appointment of a Commission did not set out any extraordinary facts or circumstances warranting these proceedings. It gave as reason for the request only their desire 'to remove all obstacles that cause delay and to bring the action to a conclusion.'" They stated further that "The Trial Court made no statement or finding of fact as to what prompted it to conclude that the interest of justice demanded the invocation of the extraordinary rather than to permit the ordinary procedure contemplated by the rule."

In the case of United States v. Wallace, 201 F. 2d 65 and United States v. Waymire, 202 F. 2d 550, the United States Court of Appeals for the Tenth Circuit in each case affirmed the decision of the Court below appointing Commissioners and in each case indicated that there were facts within the cases to support the exercise of discretion by the District Court which discretion was specifically admitted by the Court of Appeals to exist in the United

States v. Theimer case, even though there improperly exercised.

In the instant cases the United States Court of Appeals for the Eighth Circuit states in the last paragraph of the decision "The showing made by each of the landowners and the findings thereon in the Court afforded sufficient basis for the Court's orders."

In each of these cases facts were presented to the District Court in the affidavit sufficient to justify the exercise of discretion and the reference to the Commission.

On page 13a of the appendix in appellant's brief the Court below cites the supplemental report of the Advisory Committee to the Supreme Court of March, 1951, as reported in 28 U. S. C. A. pocket part and quotes therefrom, including footnote one, which is set out at the bottom of said page 13a. The Judicial Conference referred to on page 6 of appellant's brief was after the appointment of Commissioners was made in the instant cases and has no application here.

The Missouri River program is larger than the TVA. Just as the discretion existed in the Court in the cases of United States v. Waymire and United States v. Wallace to refer those matters to a Commission under the rule so did the facts in each case here justify such reference, and in addition to the unusual and extraordinary facts set forth in each of those individual cases, we have the additional fact that a large project like the TVA is here involved, bringing us squarely within the wording of the report.

It seems that appellants, instead of pointing out a conflict between the two Circuits are actually trying to maintain a position contrary to that of either Circuit and instead of petitioning this Court for a writ of certiorari should again request a change in the wording of Rule 71 A

(h) or else adjust their position in accordance therewith. Both the Tenth Circuit and the Eighth Circuit decisions are in accordance with the wording of Rule 71 A (h).

The appellants state (page 9 of their brief): "There are increasing indications of resort by District Judges to the Commission in run-of-the-mill cases." The present cases are not run-of-the-mill cases and the Courts below have so found. Appellants will undoubtedly continue to find the Courts in agreement with their position in the ordinary cases, that is, in cases which are not a part of a huge project like TVA and which are without the extraordinary features here involved.

CONCLUSION.

For the foregoing reasons we respectfully submit that the petition for writ of certiorari should be denied.

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